STATE OF MICHIGAN

COURT OF APPEALS

KELLY M. HAGAN, as Trustee for THE BANKRUPTCY ESTATE OF NORTHWESTERN FINANCIAL CORPORATION

Plaintiff/Counter-Defendant-Appellant,

v

SATORI CORPORATION, a Michigan Corporation,

Defendant/Counter-Plaintiff/ Cross-Plaintiff-Appellee,

and

R & K STEPHENS COLLEGE EDUCATION TRUST u/a/d January 1 2006,

Defendant-Appellees,

and

DELHI WOODS ESTATES LLC, a Michigan limited liability company,

Defendant/Counter-Defendant/ Cross-Defendant-Appellee.

UNPUBLISHED
May 12, 2015

No. 321593
Washtenaw Circuit Court
LC No. 12-1265-CH

Before: BOONSTRA, P.J., and SAAD and MURRAY, JJ.

PER CURIAM.

Kelly M. Hagan ("Trustee"), trustee for the bankruptcy estate of Northwestern Financial Corporation ("Northwestern"), appeals by right the trial court's order that granted summary disposition in favor of defendants Satori Corporation ("Satori") and R & K Stephens College Education Trust ("Stephens"). The trial court held that Satori's mortgage interest had priority and was superior to any other party's interest in the subject property. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case concerns three mortgages executed by Thomas N. Burnham and Pamela H. Burnham on vacant property located in Scio Township, Washtenaw County. First, on December 16, 2005, the Burnhams executed a mortgage to the Manufacturers Financial Corporation ("Manufacturers") for $907,800. This mortgage was recorded on January 30, 2006. Second, the Burnhams executed a mortgage to Northwestern for $300,000 on December 19, 2005, and that mortgage was recorded on July 7, 2006. Third, the Burnhams executed a mortgage to Delhi Woods Estates, LLC ("Delhi Woods") for $400,000 on June 25, 2006, which mortgage was recorded on June 26, 2006.

Manufacturers made two assignments of its mortgage. First, on May 17, 2006, Manufacturers assigned its mortgage to Satori which was recorded on May 23, 2006. Manufacturers then made another assignment to Stephens on June 1, 2006, which was recorded on June 19, 2008.[1] The mortgage interests thus were recorded in the following order: (1) Manufacturers; (2) Satori (by assignment from Manufacturers); (3) Delhi Woods; (4) Northwestern; (5) Stephens (by assignment from Manufacturers). Subsequently, the Burnhams defaulted, and this litigation followed.

Trustee filed this action in the trial court, seeking to establish Trustee's priority over Satori, Stephens, and Delhi Woods regarding the mortgaged property under MCL 600.2932 and MCL 561.7. Satori also filed a cross-claim seeking to establish its priority against Delhi Woods.

Trustee then moved the trial court for summary disposition pursuant to MCR 2.116(C)(10), contended that no genuine issues of material fact existed. Specifically, Trustee contended that a subordination clause in the Manufacturers mortgage rendered that mortgage secondary to the Northwestern mortgage.[2] The pertinent provision reads as follows:

> 33. **Mortgage Subordination**. As an exemption to Section 24, Mortgagors and Mortgagee acknowledge and agree that *this Mortgage can be subordinate to a mortgage of another lender, if such new mortgage is brokered by Mortgagee*. This Mortgage would become a "second mortgage" as to any amounts not paid by the new mortgage financing. Mortgagee would still owe to Mortgagor the interest difference ("spread") between this Mortgage and Note and the new mortgage for the term of the Mortgage and Note. [Emphasis added].

[1] Although irrelevant to our analysis, the record is unclear regarding what interest Manufacturers could have assigned to Stephens after assigning its interest to Satori. In any event, the assignment to Stephens indicated that it was subordinate to the earlier assignment to Satori.

[2] Northwestern also argued that Delhi Woods had actual notice of the Northwestern mortgage at the time it executed the Delhi Woods mortgage, and that the Northwestern mortgage thus had priority over the Delhi Woods mortgage notwithstanding that it was recorded later. Delhi Woods did not contest this position, did not file or respond to any motions in the trial court, and, apart from filing an answer to Satori's cross-claim, did not participate in this litigation. The trial court did not expressly decide this issue, and we need not decide it on appeal.

Trustee argued that Manufacturers brokered the Northwestern mortgage, and that this clause thus became self-executing and rendered the Manufacturers mortgage (and therefore Satori's interest, as an assignee of Manufacturers) secondary to the Northwestern mortgage.

Satori filed a response to Trustee's motion and sought summary disposition pursuant to MCR 2.116(I)(2). Satori contended that the Manufacturers mortgage retained priority because the subordination clause was plainly permissive, not mandatory, and thus was not self-executing. Therefore, without a separate subordination agreement, the Manufacturers mortgage would have priority because it was recorded before the Northwestern mortgage. In the alternative, assuming that the subordination clause was mandatory, Satori asserted that Northwestern was not the broker of the Northwestern mortgage, and that a condition necessary for the clause to be self-executing therefore was not met. Stephens also filed its own summary disposition motion pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) and supported Satori's arguments that the subordination clause was not self-executing.

At the motion hearing, the trial court granted summary disposition to Satori and Stephens, and held that the language in the mortgage was not self-executing and that Satori's mortgage therefore was "superior to any other party's interest in the subject property."[3] This appeal followed.

II. MORTGAGE PRIORITY

Trustee contends that the trial court erred in denying summary disposition to Northwestern, and in granting summary disposition to Satori and Stephens, because the subordination clause in the Manufacturers mortgage rendered Satori's mortgage interest secondary to the Northwestern mortgage. We disagree.

The trial court granted summary disposition to Satori pursuant MCR 2.116(I)(2). Summary disposition under MCR 2.116(I)(2) is appropriate when "it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). The trial court did not indicate whether it granted Stephens' motion under MCR 2.116(C)(8) or MCR 2.116(C)(10). Because the trial court considered material outside the pleadings, this Court will review the decision as based on MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). We review de novo the grant or denial of summary disposition under both MCR 2.116(I)(2) and MCR 2.116(C)(10). *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996) (MCR 2.116(I)(2)); *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012) (MCR 2.116(C)(10)).

[3] Although the summary disposition order does not explicitly reference Satori's cross-claim against Delhi, the trial court found Satori's interest superior to "any other party's interest," and entered a final order that disposed of all claims, which suggests that it had resolved Satori's cross-claim against Delhi in favor of Satori.

Under MCL 565.29, a mortgagee who first records its mortgage obtains priority among competing mortgages, unless that mortgagee had actual knowledge of a prior unrecorded interest. See *Michigan National Bank & Trust v Morrer*, 194 Mich App 407, 410-11; 487 NW2d 784 (1992). However, a mortgagee may waive its priority through either a separate subordination agreement or a self-executing subordination clause in the mortgage contract. MCL 565.391.

Courts resolve questions regarding the scope and effect of subordination agreements or clauses under general contract principles. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131; 602 NW2d 390 (1999). Therefore, courts examine a subordination agreement or clause for its ordinary and plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Contracts must be "construed so as to give effect to every word or phrase as far as practicable." *Klapp v United Ins Group Agency, Inc*, 468 Mich. 459, 467; 663 NW2d 447 (2003), quoting *Hunter v Pearl Assurance Co, Ltd*, 292 Mich 543, 545; 291 NW 58 (1940). Clear and unambiguous language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

Trustee contends that the subordination clause in the Manufacturers mortgage unambiguously subordinates the Manufacturers mortgage to the Northwestern mortgage. We disagree. The clause states that "this Mortgage *can be* subordinate to a mortgage of another lender, if such new mortgage is brokered by Mortgagee." (Emphasis added.) This language is clearly permissive. Analyzing the plain and ordinary meaning of the words chosen, the phrase "can be subordinate" means just that: if the parties so choose, the Manufacturers mortgage could be subordinated to another mortgage if the subsequent mortgage were to be brokered by Manufacturers. Were we to assume that Manufacturers brokered the Northwestern mortgage, nothing in the clause compels us to adopt Trustee's contention that the subordination clause would then self-execute.

The contracting parties' use of "can be" instead of "shall be" militates against a mandatory reading. The word "shall" is generally used to designate a mandatory provision. *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013); *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006); see also *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (explaining that "may" designates discretion); *Mull v Equitable Life Assurance Soc*, 444 Mich 508, 519; 510 NW2d 184 (1994) (equating "may be" with a possibility); *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 535; 669 NW2d 594 (2003). At most, the clause shows the parties' intention to leave the door open to a future, separate subordination agreement in certain circumstances. Once again, courts examine a contract for its ordinary and plain meaning. *Wilkie*, 469 Mich at 47. The plain and ordinary meaning of the subordination clause in issue is permissive. Therefore, Trustee's argument lacks merit.

Further, if the subordination clause were self-executing, and although the trial court did not rule on this issue, the record evidence shows that Manufacturers was not the broker of the Northwestern mortgage. This Court may consult a dictionary to aid in interpretation when, as here, the term "broker" is not defined in the contract. See *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). Black's Law Dictionary (9th ed, p 220) defines a mortgage broker as "an individual or organization that markets mortgage loans and brings lenders and borrowers together" and further makes clear that a "mortgage broker does not originate or service mortgage loans." Here, the Settlement Statement for the Northwestern mortgage says that Northwestern received a "Mortgage Broker Fee," while Manufacturers received an "Origination Fee." Therefore, the dictionary definition

coupled with the Settlement Statement shows that Manufacturers did not "broker" the Northwestern mortgage.

In the alternative, Trustee says that because the subordination agreement is ambiguous, summary disposition should not have been granted and, instead, the case should be remanded for further proceedings. A contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways. See *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 566-567; 596 NW2d 915 (1999). Here, Trustee's contention that the phrase "can be" in the subordination clause could refer to two different reasonable interpretations is simply wrong. The subordination agreement is not subject to two reasonable interpretations. In this instance, interpreting "can be" as mandatory language is unreasonable. See *Walters*, 481 Mich at 383.

Because the subordination clause is not self-executing, priority is determined by which party, here Satori, recorded its interest first.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Christopher M. Murray